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Kevin L. Smith

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BARNES, Judge

Case Summary

The State appeals the trial court's granting of Tina Weatherwax-Ausman's motion to suppress. We affirm.

Issue

The State raises one issue, which we restate as whether the trial court properly granted Weatherwax-Ausman's motion to suppress.

Facts

On September 26, 2006, Indiana State Police officer Robert Burgess was in his car in a Wal-Mart parking lot in Logansport. Trooper Burgess was following up on a case in which he was involved. While Trooper Burgess arranged his paperwork in his car, Weatherwax-Ausman parked her SUV in the parking space next to Trooper Burgess. Weatherwax-Ausman was conversing with her passenger, Troy Liggin. She left her car and walked into the store. Approximately thirty seconds later, Liggin got out of the car and entered the store. Trooper Burgess also entered the store and walked to the pharmacy area of the store. Liggin was at the counter purchasing one box of pseudoephedrine-based cold medicine, and Weatherwax-Ausman was in the aisle where the cards for the pseudoephedrine-based cold medicine were located. Trooper Burgess observed Weatherwax-Ausman walk to the end of the aisle and look in Liggin's direction at least two times. After Liggin completed his purchase, he left the store and Weatherwax-Ausman purchased one box of pseudoephedrine-based cold medicine.

Prior to the completion of Weatherwax-Ausman's purchase, Trooper Burgess left the store and approached Liggin, who had returned to the passenger seat of the SUV.

Trooper Burgess questioned Liggin, who explained that he purchased the pseudoephedrine for a cold. Trooper Burgess saw Weatherwax-Ausman come out of the store, look over at the car, and smile “a little bit like, uh, who is this guy.” Tr. p. 28. When Weatherwax-Ausman saw the plain-clothed Trooper Burgess use his portable radio, she turned around, picked up her pace, and walked away. Trooper Burgess motioned twice and yelled, “‘Come over here. I want to talk to you.’” Tr. p. 29. Weatherwax-Ausman walked toward Trooper Burgess, who asked her if she had purchased pseudoephedrine in the store. Weatherwax-Ausman stated that she had purchased it to treat a cold.

Trooper Burgess asked permission to search the SUV and found aluminum foil strips and lithium batteries. Trooper Burgess arrested Weatherwax-Ausman and Liggin, interviewed Weatherwax-Ausman, and obtained permission to search her home.

On October 13, 2006, the State charged Weatherwax-Ausman with Class A felony dealing in methamphetamine and Class D felony possession of chemical reagents or precursors with the intent to manufacture a controlled substance. Weatherwax-Ausman filed a motion to suppress, which the trial court granted. The State now appeals.

Analysis

The State argues that the trial court improperly granted the motion to suppress because the encounter between Weatherwax-Ausman and Trooper Burgess was consensual and, even if it was not a consensual encounter, it was based on reasonable suspicion. The issue is whether the trial court abused its discretion by granting Weatherwax-Ausman’s motion to suppress. State v. Eichhorst, 879 N.E.2d 1144, 1147

(Ind. Ct. App. 2008), trans. pending. When appealing from a trial court's order granting a motion to suppress, the State has the burden of demonstrating the constitutionality of the measures it used to secure information. Id. at 1147-48. The State is, therefore, appealing from a negative judgment. Id. We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. Id. We consider only the evidence most favorable to the judgment and do not reweigh the evidence or judge the credibility of the witnesses. Id.

The State first argues that the encounter between Weatherwax-Ausman and Trooper Burgess was consensual. It claims, "This was simply an officer engaging two people in a consensual encounter. As such no constitutional protection was implicated." Appellant's Br. p. 8.

Indeed, a consensual encounter does not implicate a defendant's Fourth Amendment rights. Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), trans. denied. A consensual encounter occurs when a law enforcement officer makes a casual and brief inquiry of a citizen that involves neither an arrest nor a stop. Id. As long as an individual engaged by the police remains free to leave, the encounter is consensual, and there has been no intrusion upon that person's liberty or privacy to require some particularized and objective justification. Shirley v. State, 803 N.E.2d 251, 255 (Ind. Ct. App. 2004).

Examples of circumstances in which a reasonable person would believe he or she was not free to leave include the threatening presence of several officers, the display of a

weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Overstreet, 724 N.E.2d at 664.

We believe that Trooper's Burgess's actions fall within this last example. From across the parking lot, approximately thirty-five or forty yards away, while standing at Weatherwax-Ausman's car, Trooper Burgess motioned to her and yelled, "'Come over here. I want to talk to you.'" Tr. p. 29. This was not an exchange in which a police officer encountered an individual and engaged him or her in a brief conversation, which interaction the individual was free to disregard. Instead, Trooper Burgess demanded that Weatherwax-Ausman change direction, walk across the parking lot, and talk to him. That Trooper Burgess did not display his weapon, was not accompanied by other law enforcement officers, and was in plain clothes does not render his demand a consensual encounter. The State has not established that all reasonable inferences lead to a conclusion opposite that reached by the trial court.

The next question we must address is whether there was reasonable suspicion to support Weatherwax-Ausman's detention. "Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution protect the privacy and possessory interests of individuals by prohibiting unreasonable searches and seizures." Manigault v. State, 881 N.E.2d 679, 685 (Ind. Ct. App. 2008). This protection also governs the seizure of a person. Id. Under the Fourth Amendment to the United States Constitution, a person may be detained on less than probable cause if the officer has a justifiable suspicion the suspect has committed a crime. Id. In addition to

the Fourth Amendment, under Article 1, Section 11 of the Indiana Constitution, the State must show that, in the totality of circumstances, the intrusion was reasonable. Id. at 686.

Under these facts, pursuant to the Indiana Constitution, we cannot conclude that the intrusion was reasonable. In State v. Bulington, 802 N.E.2d 435 (Ind. 2004), our supreme court addressed a similar situation. In Bulington, the Lafayette Police Department had instructed Meijer Superstore's loss prevention team to report the purchase of three or more boxes of certain medications to the police. A loss prevention team member observed Bulington and another man each select three boxes of antihistamines and proceed to separate checkout counters. The loss prevention team member contacted the police and observed the two men leave the store separately and go to the same truck. The two men began removing the tablets from the boxes and placing them in their shopping bags. As the two men were leaving in the truck, police officers stopped the truck and asked for consent to search. In the truck, officers found an extensive amount of ephedrine pills and other precursors used in the manufacture of methamphetamine.

The State charged Bulington with several drug related offenses. Bulington moved to suppress the items found in his truck and his statement. The trial court granted Bulington's motion, and the State appealed. A panel of this court reversed, and our supreme court granted transfer to answer "whether the content of the information contained in that tip was enough to provide Officer McCoy with reasonable suspicion." Bulington, 802 N.E.2d at 438. In answering this question, our supreme court acknowledged:

On the one hand, the police had absolutely no reason to believe defendant had violated or was violating any law when he was stopped. While it is a crime to possess two or more “chemical reagents or precursors” with the intent to manufacture methamphetamine, Ind. Code § 35-48-4-14.5(c), the evidence is not disputed that the defendant and his companion only purchased one such reagent or precursor at Meijer, ephedrine. And the trial court specifically found that defendant had not committed any traffic violation.

On the other hand, defendant was not stopped at random. There was at least some reason to believe that, to use a phrase borrowed from federal jurisprudence, “criminal activity might be afoot”—defendant and his companion had together purchased a quantity of one “reagent or precursor.”

Id. at 439-40.

Our supreme court concluded that this was not enough to establish reasonable suspicion for purposes of Article I, Section 11. The court reasoned that if:

the principal value of art. I, § 11, is to “protect Hoosiers from unreasonable police activity in private areas of their lives,” then the standards for its application must . . . “reduce[] the opportunities for official arbitrariness, discretion, and discrimination.” The opportunities for official arbitrariness, discretion, and discrimination are simply too great if we were to find that the purchase by two companions of three packages each of cold medicine justifies a search or seizure under art. I, § 11. Such a holding, at least in an Indiana winter, would permit so many searches and seizures as to license official arbitrariness, discretion, and discrimination in their execution.

Id. at 440 (alteration in original) (footnote omitted) (citations omitted). Our supreme court considered similar cases from other jurisdictions and concluded:

the respective courts relied on at least one other additional specific and articulable circumstance that, when combined with the purchase of one precursor, produced evidence sufficient to create an inference that the defendant’s intention in engaging in the combination of activities was to possess

chemical reagents or precursors for the manufacturing of methamphetamine.

Id. at 441-42.

Here, Trooper Burgess testified at the suppression hearing that the “sole reason” for asking Weatherwax-Ausman to come speak with him was based on “seeing these two individuals get out of the Ford Explorer, not at the same time, go in, each purchase one package of cold pills.” Tr. p. 11. We cannot conclude that two individuals arriving at a superstore parking lot together and separately proceeding to purchase one box of pseudoephedrine each is in and of itself a reasonable basis for intruding on one’s privacy. Although Trooper Burgess has extensive training and knowledge of methamphetamine-related crimes, Bulington’s holding stands. Without more, there was an insufficient basis to support the stop of Weatherwax-Ausman. Again, the State has not established that all reasonable inferences lead to a conclusion opposite that reached by the trial court.

Conclusion

The encounter between Weatherwax-Ausman was not consensual. Trooper Burgess’s stop of Weatherwax-Ausman was not reasonable under the Indiana Constitution. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.